Supreme Court, U.S.
FILED
AUG 11 2005
OFFICE OF THE CLERK

No. 05-08

IN THE

Supreme Court of the United States

BONNIE G. SNAVELY,

Petitioner,

v.

DOUGLAS MILLER,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REPLY BRIEF OF PETITIONER	1
CONCLUSION	9

TABLE OF AUTHORITIES

CASES — Page

Amen v. *City of Dearborn*, 718 F.2d 789 (6th Cir. 1983) 4
Firefigher's Local Union No. 1784 v. *Stotts*, 467 U.S. 561 (1984) 6
Forsyth v. *City of Hammond*, 166 U.S. 506 (1897) 4
Hamilton-Brown Shoe Co. v. *Wolf Bros. & Co.*, 240 U.S. 251 (1916) 5
Hanna Boys Ctr. v. *Miller*, 853 F.2d 682 (9th Cir. 1988) 4
Harris v. *Zion's Sav. Bank & Trust Co.*, 317 U.S. 447 (1943) 1
LaShawn A. v. *Barry*, 87 F.3d 1389 (D.C. Cir. 1996) 4
Macken ex rel. Macken v. *Jensen*, 333 F.3d 797 (7th Cir. 2003) 8
Markham v. *Allen*, 326 U.S. 490 (1946) 5, 7
Marshall v. *Marshall (In re Marshall)*, 392 F.3d 1118 (9th Cir. 2004), *petition for cert. filed*, 73 U.S.L.W. 3694 (May 17, 2005) (No. 04-1544) ... 2, 8
Pennsylvania v. *Ritchie*, 480 U.S. 39 (1987) 2, 4
Sianis v. *Jensen*, 294 F.3d 994 (8th Cir. 2002) 8
United States v. *Houser*, 804 F.2d 565 (9th Cir. 1986) 4
United States v. *Williams*, 504 U.S. 36 (1992) 3

REPLY BRIEF OF PETITIONER

Petitioner seeks review of a case in which a Bankruptcy Court exceeded its jurisdiction under the "probate exception" to federal jurisdiction and issued an injunction against an all but complete state court action and then proceeded to retry a host of issues related to a decedent's disposition of her assets on death through a trust arrangement. In so doing, the Bankruptcy Court invaded an area – the transfer of assets upon death – that nearly two centuries of this Court's decisions have staked out as "peculiarly matters of state law," *Harris* v. *Zion's Savings Bank & Trust Co.*, 317 U.S. 447, 450 (1943), and made a mockery of the respect and comity for state court proceedings by the federal judiciary that is a cornerstone of Our Federalism. The extraordinary actions of the Bankruptcy Court in this case, however, are simply the result of a much deeper problem: Rampant confusion among lower courts as to the proper scope and meaning of the probate exception.

Respondent makes two main arguments as to why the Court should not accept certiorari in this case. First, he claims that the Court lacks jurisdiction to consider the question presented in the appeal. This claim is utterly without merit. Respondent insists that because some issues related to the question presented were previously considered on appeals to the Ninth Circuit in the same bankruptcy case, this Court cannot now consider them. In making this argument Respondent lays great emphasis on the fact that the Bankruptcy Court's injunction has already been considered by the Ninth Circuit in a previous appeal. He also suggests that this case is moot.

Respondent's jurisdictional arguments are without merit. The Ninth Circuit explicitly considered the question of subject-matter jurisdiction in the opinion from which this petition comes. Furthermore, the law-of-the-case doctrine invoked by Respondent simply does not apply to this Court's

proceedings. *Pennsylvania* v. *Ritchie*, 480 U.S. 39, 49 n.7 (1987). Respondent's argument also confuses the basic issue of subject-matter jurisdiction – which is the legal question on which Petitioner seeks this Court's review – with the injunction – which is negative consequence that flowed from the Bankruptcy Court's refusal to apply the probate exception and which illustrates the gravity of the Bankruptcy Court's initial error. Finally, Respondent's mootness claim founders on the fact that potentially hundreds of thousands of dollars remain at issue in this suit.

Respondent's second main argument against certiorari is that this Court's review is not necessary because no real confusion exists among the lower courts. This argument is similarly without merit, a fact illustrated by the Brief in Opposition's heavy reliance on *ipse dixit* and minimal analysis of the conflicting circuit precedents. As set forth in the Petition for Certiorari, the circuit courts are relying on conflicting doctrinal formulations that are leading to differing treatment of substantially similar cases. Tellingly, the one case that that Respondent does discuss in detail, *Marshall* v. *Marshall (In re Marshall)*, 392 F.3d 1118 (9th Cir. 2004), *petition for cert. filed*, 73 U.S.L.W. 3694 (May 17, 2005) (No. 04-1544), explicitly discusses – rejecting and accepting – the differing approaches of other circuits, thus acknowledging the confusion that makes review by this Court critical.

1. In his Brief in Opposition, Respondent correctly points out that this case comes to the Court after a long and procedurally complicated battle in the lower courts. His central argument that the question presented in the Petition for Certiorari cannot properly be considered by this Court, however, is without merit. First, the scope of the probate exception was explicitly decided by the decision of the Ninth Circuit from which this petition was filed. Second, the law-of-the-case doctrine does not apply to this Court's review of questions on certiorari. Third, Respondent's argument is essentially confused about the relationship between this

petition for certiorari and the injunction issued by the Bankruptcy Court against the Washington State Court. Fourth, the case is not moot.

It is a basic axiom that a higher court reviewing the decision of a lower court may consider the legal basis on which the lower court explicitly rested its decision. See *United States* v. *Williams*, 504 U.S. 36, 41 (1992) ("'It suffices for our purposes that the court below passed on the issue presented . . . .'" (quoting *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1099 n.8 (1991)). The question presented in this petition goes to the scope of a federal court's subject-matter jurisdiction to adjudicate claims arising out of the administration of a trust. See Pet. i. In its February 7, 2005 opinion from which this petition comes, the Ninth Circuit explicitly considered and rejected Petitioner's claim that the bankruptcy court was bound by the state court decision notwithstanding the bankruptcy court's injunction. Pet. App. 2a. That opinion also plainly stated that the probate exception did not apply to the claim related to the administration of the trust. *Id.* at 4a. In short, the Ninth Circuit explicitly passed on the subject-matter jurisdiction of the bankruptcy court under the probate exception. In his Brief in Opposition, Respondent seeks to avoid this basic fact by arguing that "[i]n adjudicating the Trust's claim in the Order that is the subject of this Petition no control over Trust assets was extended nor were any state probate proceedings subject to judicial determinations." Opp. 7 (citation omitted). Far from articulating some jurisdictional bar to this Court's certiorari power, however, this claim simply restates the Ninth Circuit's substantive conclusion as to the scope of the probate exception. Given that this is precisely the issue on which the Petitioner seeks this Court's clarification, the fact that the Ninth Circuit took a position hostile to Petitioner cannot possibly deprive this Court of the power to pass on the substantive merits of the Ninth Circuit's opinion.

Respondent's argument also rests on a basic misunderstanding of the nature of this Court's certiorari jurisdiction. Respondent's bankruptcy was a prolonged proceeding that included many trips to the Ninth Circuit. Under Respondent's theory, each of these appeals became the law-of-the-case and "res judicata" for subsequent proceedings in the bankruptcy case and cannot be reconsidered on subsequent appeals. Although there might be some merit to this argument in the court of appeals,[1] such an approach is entirely inappropriate in this Court. Stated succinctly "[l]aw-of-the-case principles are not a bar to this Court's jurisdiction." *Ritchie*, 480 U.S. at 49 n.7. Shortly after Congress conferred modern certiorari jurisdiction on the Court in 1891, *Forsyth* v. *City of Hammond*, 166 U.S. 506, 513 (1897) explained the expansive nature of the Court's appellate power:

> The power thus given is not affected by the conditions of the case as it exists in the Court of Appeals. It may be exercised before or after any decision by that court and irrespective of any ruling or determination therein. All

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[1] Even in the context of an appeal to the circuit court, Respondent's theory is doubtful, as several circuits have explicitly held that the law-of-the-case doctrine does not apply to questions of subject-matter jurisdiction. *See, e.g.*, *United States* v. *Houser*, 804 F.2d 565, 569 (9th Cir. 1986) ("Stated succinctly, the doctrine of 'law of the case' is inapplicable to the question of our jurisdiction to consider an appeal"); *Amen* v. *City of Dearborn*, 718 F.2d 789, 793-94 (6th Cir. 1983) ("The short answer to this claim is that the law of the case doctrine does not foreclose reconsideration of subject-matter jurisdiction."). *But see LaShawn A.* v. *Barry*, 87 F.3d 1389, 1394 (D.C. Cir. 1996) ("No such [jurisdictional] exception [to the law-of-the-case doctrine] exists."). There appears to be an intra-circuit split on this issue within the Ninth Circuit. *Compare Houser*, 804 F.2d at 568 ("The fact that the motions panel denied the Government's motion to dismiss this appeal does not free this court from the independent duty to decide whether we have jurisdiction." (internal quotation omitted)), *with Hanna Boys Ctr.* v. *Miller*, 853 F.2d 682, 686 (9th Cir. 1988) ("The motion panel's implicit determination that the district court lacked subject matter jurisdiction is the law of the case.").

> that is essential is that there be a case pending in the Circuit Court of Appeals, and of those classes of cases in which the decision of that court is declared a finality, and this court may, by virtue of this clause, reach out its writ of certiorari and transfer the case here for review and determination.

It is a well-established principle that on certiorari this Court may consider and correct any error in a case, including issues that were previously subject to appeal and have become law of the case for the lower court. See *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) ("[A]lthough in this instance the interlocutory decision may have been treated as settling 'the law of the case' [for the lower courts] . . . this court, in now reviewing the final decree by virtue of the writ of certiorari, is called upon to notice and rectify any error that may have occurred in the interlocutory proceedings."). Thus, even if the question of the probate exception had not been explicitly considered and rejected by the panel from which this petition comes (which it was), there would be no bar to the Court considering the issue now.

In his Brief in Opposition, Respondent argues that "Petitioner's counsel improperly interjected the Bankruptcy Court's Injunction Order when this matter was subject to a separate appeal for which a final decision was entered by the Ninth Circuit." Opp. 9. Not only does this claim misunderstand the plenary power of this Court to consider all issues passed on below regardless of the law-of-the-case doctrine, but also it fundamentally confuses the issues raised in the Petition for Certiorari. The probate exception is a doctrine that goes to the subject-matter jurisdiction of the federal courts. See *Markham* v. *Allen*, 326 U.S. 490, 494 (1946) (stating that the probate exception is an exception to the subject-matter jurisdiction of the district court). In this case the Bankruptcy Court took control over proceedings that it had no subject-matter jurisdiction to consider. The Bankruptcy Court's subsequent injunction and other interference

with the state court proceeding were the unhappy consequence of its decision to exceed its jurisdiction. The procedural train-wreck in this case illustrates why the probate exception is necessary for the proper functioning of our federal system. However, the issue is whether the lower courts erred in assuming jurisdiction itself. The unhappy events that followed from that initial error simply illuminate why that issue warrants further review by this Court.

Respondent's suggestion that this case is moot is similarly without merit. This Court has emphasized that "[a]s long as the parties have a concrete interest in the outcome of the litigation, the case is not moot." *Firefigher's Local Union No. 1784* v. *Stotts*, 467 U.S. 561, 571 (1984). According to Respondent, the Ninth Circuit's earlier decision that claims relating to title to certain property is moot "applies equally to these proceedings." Opp. 10. Tellingly, however, in the opinion from which this petition comes, the Ninth Circuit itself did not believe that the decision cited by Petitioner rendered the dispute over the probate exception moot. See Pet. App. 4a. Even assuming *arguendo* that certain claims relating to real estate have been mooted, Petitioner was forced by the Bankruptcy Court's injunction against the state court proceedings to file a poof of claim of more than $600,000 against Respondent, which the Bankruptcy Court then largely disallowed, directly contradicting the State Court's prior oral decision. See *id.* at 23a, 63a-64a and 95a-142a. The Bankruptcy Court's jurisdiction over these money claims was directly challenged and passed upon in the Ninth Circuit opinion in this case. See *id.* at 4a. This Court has stated that even where nominal sums are at issue "the amount of money . . . at stake does not determine mootness." *Firefighter's Local 1784*, 467 U.S. at 571. In this case, at a bare minimum, $603,906.12 remains at issue. See Pet. App. 4a.

2. Respondent asserts without any significant discussion of the cases that there is no conflict among the circuits. His only argument in support of this position is that the Petitioner's

claim would fail under any test. This argument is both logically incoherent and substantively mistaken. As a logical matter, the fact that there are certain cases that will be treated the same under any circuit's test does not mean that the tests are not in conflict with one another. Presumably no circuit would take the position that a federal court has subject-matter jurisdiction to probate a will. *Markham*, 326 U.S. at 494 ("a federal court has no jurisdiction to probate a will or administer an estate"). This does not mean, however, that the circuits do not decide other, more difficult cases, in wildly divergent ways. See Pet. 13-18.

Furthermore, as explained in the Petition, it simply is not true that the Petitioner's claims would fail under any and every circuit's test. See *id.* Respondent offers essentially two arguments in support of his position. First, he makes the odd claim that because his claims regarding tortious interference with business relations and the like are not within the probate exception, other claims regarding the administration of the trust are also not within the exception. See Opp. 11. To state this argument is to refute it. The fact that the Bankruptcy Court properly had jurisdiction over some claims cannot magically expand its jurisdiction to include cases categorically beyond the competence of the federal courts. Alternatively, Respondent simply denies that the trust's claims have anything do with the probate exception however defined. See *id.* at 12-13. As is explained in the Petition, however, in this case the Bankruptcy Court ultimately stayed and ignored the state court's adjudication of a matter involving the administration of a trust made final and irrevocable by a decedent's will. See Pet. 3. Indeed, state law required that the action that brought Petitioner to state court in the first place – the sale of trust property to the trustee – could only be taken by obtaining permission from a competent state tribunal. See *id.* This was the case stayed by the bankruptcy court and relitigated in the federal forum. Simply asserting that in such a matter "no control was

exercised in probate matters" substitutes *ipse dixit* for analysis. Certainly, some circuits have treated trust-related claims as falling within the probate exception. See, *e.g.*, *Macken ex rel. Macken* v. *Jensen*, 333 F.3d 797, 799 (7th Cir. 2003) and *Sianis* v. *Jensen*, 294 F.3d 994, 999 (8th Cir. 2002).

Finally, Respondent seeks to distinguish this case from the Ninth Circuit's earlier decision in *In re Marshall*, 392 F.3d 1118 (9th Cir. 2004), denying that the outcome in that case indicates confusion either among the circuits or within the Ninth Circuit itself. First, it is important to note that the *Marshall* opinion itself acknowledges and discusses the conflict among the circuits on the scope of the probate exception, considering and rejecting the approach taken by one circuit, see *id.* at 1132 ("We specifically reject the [Eleventh Circuit's] pronouncement and hold that the probate exception is applicable in bankruptcy cases."), while explicitly considering and adopting the approach taken by another circuit, see *id.* ("[W]e adopt the framework for analysis laid out by the Second Circuit in *Moser v. Pollin*, 294 F.3d 335, 340 (2d Cir.2002), because it mirrors the explanation of the probate exception as set forth by the Supreme Court in *Markham*."). Respondent claims that there is no conflict between *Marshall* and this case because *Marshall* involved a *de facto* challenge to a will. Opp. 13-14. In *Marshall*, however, the court explicitly stated that the probate exception encompasses more than "only direct challenges to a will or trust." *In re Marshall*, 392 F.3d at 1133. In *Marshall*, as in this case, the state court proceeding stayed by the bankruptcy court involved a trustee's distribution of assets. Yet the Ninth Circuit itself made no effort to distinguish the *Marshall* opinion. Furthermore, even if ultimately the Marshall opinion and the present case can be twisted into conformity with one another, the absence of a clear intra-circuit split in the Ninth Circuit does not remove the much more important issue of inter-circuit splits around

the country. It is those decisional conflicts, acknowledged by the Ninth Circuit in *Marshall* that warrant this Court's review.

CONCLUSION

For the reasons stated above and in the Petition for Certiorari, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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